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IN THE

Supreme Court of the United States

October Term, 1970

No. 917

MORTON JACOBS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Morton Jacobs prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on August 24, 1970.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. It is reprinted as Appendix "A" hereto, *infra.*

Jurisdiction

The judgment of the Court of Appeals was entered on August 24, 1970. A timely petition for rehearing and for rehearing *in banc* was denied on September 29, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1).

Questions Presented

1. Whether there is a conflict among the circuits as to the proper charge to the jury on the law of conspiracy as to the standards of proof necessary to establish a defendant's membership or participation in a criminal conspiracy; whether the charge of the trial judge in this case as to the proof necessary to determine a defendant's membership in a conspiracy was correct; and whether the supplemental charge on conspiracy was proper and correct, especially after counsel for both sides agreed that the trial judge was to and did charge particularly on the law of the "two-man conspiracy" in his original charge, which was completely omitted from the supplemental charge.

2. Whether the rule in the Second Circuit that the trial judge makes a preliminary determination as to the sufficiency of the proof of a defendant's membership in a conspiracy, and thereupon withdraws from the jury's consideration the fact issue of such defendant's membership, derives him of the constitutional right to trial by jury.

3. Whether as a matter of law there was any proof of a criminal conspiracy as charged in Count One of the indictment between the two defendants named in the indictment.

4. Whether as a matter of law there was any proof of the substantive crime of bribery by petitioner Jacobs, as charged in Count Two of the indictment.

5. Whether the use of electronic, radio transmission and recording equipment by the government without a warrant to overhear, record and transmit conversations in petitioner Jacobs' office, violated his constitutional rights against unlawful search and seizure.

Constitutional Provisions and Statutes Involved

Constitution of the United States

AMENDMENT 4

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT 5

". . . nor shall be compelled in any criminal case to be a witness against himself, . . ."

AMENDMENT 6

"In any criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed".

TITLE 18, UNITED STATES CODE

§2. *Principals.* "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal".

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal".

§ 201. *Bribery of public officials and witnesses.* "(b) Whoever, directly or indirectly, corruptly gives, offers or

promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty".

§ 371. *Conspiracy to commit offense or to defraud United States.* "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both".

Statement of the Case

The Indictment

The indictment in this case contained six counts. Count One was the conspiracy count, Count Two the substantive count of bribery, and the last four counts charged the defendant Spieler alone with perjury before the grand jury. On motion for a severance of counts, the perjury counts were severed and the case tried on the first two counts only.

Count One alleged a conspiracy between defendants Jacobs and Spieler, with no co-conspirators alleged or contended, in which it is alleged that the defendants conspired to bribe Revenue Agent Brian Bruh, in connection with a pending grand jury proceeding. Count Two alleged that the defendants "did corruptly offer and promise a thing of value" to Bruh with intent to influence him so as to obstruct and impede the pending investigation.

The Record

The record of this case before the Court of Appeals consisted of the complete original record of the District Court. Nine copies of an appendix were filed in the Court of Appeals.

The Facts

The facts of the case disclose that Revenue Agent Brian Bruh, a then "friend" of petitioner Jacobs, and his early morning car companion was asked by Jacobs if he, Bruh, could help Jacobs' friend and attorney Spieler, by finding out the status of a case in Bruh's office in which Spieler represented a potential defendant. Bruh initially told Jacobs that he was getting involved in something deep if he made such inquiries and not to pursue the matter. Jacobs then said that he would not. To all intents and purposes the matter ended there.

However, Bruh returned to his office, reported Jacobs' inquiry and a plan was then hatched with agents of the Treasury Department's Inspection Service to inveigle or entrap Jacobs, Spieler and others, including especially the famous theatrical personality, Allen King, the person whose income tax returns were the subject of the investigation, into an attempted bribe situation. Bruh was then wired up for sound, carrying both a radio transmitter and tape recorder, and he engaged Jacobs in many conversations, all of which were recorded, transmitted, monitored and thereafter transcribed. These activities took place

either in Jacobs' office or his car in which Bruh was a passenger. Bruh stimulated and carried on the conversations, starting them always to inveigle Jacobs into making incriminating and improper statements. Also, Bruh tried mightily to have Jacobs arrange a meeting with Spieler, to no avail.

Then one day Bruh fortuitously met Spieler in Jacobs' office. He testified to engaging in a bribe conversation (which somehow in its essential detail was *not* on the tape or transcription). Bruh wanted Spieler to call him at his office at the Internal Revenue Service, to which Spieler replied in substance "I've got your number". Thereafter, Bruh started calling Spieler directly, without success in reaching him, and finally Spieler left word with his telephone answering service to tell Bruh he was not interested in anything Bruh had to say to him.

At no time or place did either Jacobs or Spieler make any offer to Bruh to bribe him or to do anything to interfere with or obstruct the grand jury proceeding or investigation described in the indictment. At best the case consisted of Bruh's numerous conversations with Jacobs, all designed or slanted to inveigle or entrap both Jacobs and Spieler into making a bribe offer to Bruh or another revenue agent. No offer ever was made. The entrapment plot failed, but Jacobs and Spieler were indicted nevertheless.

Both defendants were convicted after a bizarre trial, and both appealed. Both convictions were affirmed and both defendants are filing certiorari petitions.

The Charge of the Trial Court

To a great extent the problems in this case result from the charge of the trial court. Firstly, in advance of the summations, written requests to charge were submitted to the court. Prior to the summations of counsel, the court

ruled on the requests. See T.R. 995-1013. To the extent pertinent to this petition these requests and the court's ruling and actual charges are discussed herein. Secondly, after the charge, when the court asked for exceptions and further requests in a colloquy among court and counsel, it was agreed that a charge on the "two-man conspiracy" would be given to the jury, which was done (T.R. 1174-1175, 1178-1183, Court Exhibit 7). Finally, the proceedings resulting in the giving of a supplemental charge on the law of conspiracy will be discussed (T.R. 1193-1229).

The government submitted among its requests to charge, Request Number 11, dealing with Count Two of the indictment, labeled "offer or promise". Counsel for Jacobs stated that he objected to government's Request Number 11. After colloquy among court and counsel (T.R. 995-998), the Court stated that it intended to charge, in substance, this Request Number 11, "without, however, even intimating to the jury that they have got to find who was the principal and who aided and abetted of the defendants, as to the two defendants" (T.R. 998). In spite of what the Court said at that time, when it came to the charge on this point, the Court did exactly what it said it would not do. See T.R. 1149.

The government also submitted a supplemental Request Number 1, "legality of records and extension listenings". The substance of this request was stating to the jury that it was legal and proper for the government to use the recording and transmitting devices with which Bruh was outfitted. Petitioner Jacobs made specific exception to this request (T.R. 998-999). It was the contention of counsel for Jacobs that this was a matter of law and not something as to which the jury should be instructed (T.R. 999). Nevertheless, the Court instructed the jury that the use of these recording and transmitting devices was "entirely within the law and violates no one's rights. Put succinctly, the use of these devices was proper investigative technique" (T.R. 1162).

Among the requests to charge of Jacobs, was Request Number 9, relating to the law of conspiracy. The government objected to the second paragraph of this Request Number 9. For the convenience of the Court, the entire request is repeated herein as follows:

> "If you are satisfied beyond a reasonable doubt that the conspiracy described in Count One of the indictment existed between at least one of the defendants and a co-conspirator, you must then consider the evidence relating to each defendant named in Count One separately and decide whether the evidence proves beyond a reasonable doubt that he was a member of the conspiracy or whether it does not.
>
> In deliberating on this question of each defendant's knowing participation or membership in the conspiracy, you must consider the evidence as to each defendant individually. You must confine your deliberations to the independent evidence as to his own actions, his own conduct, his own statements or declarations, and the reasonable inferences to be drawn from such independent evidence. You may not base your decision as to whether or not he was a member of the conspiracy on evidence consisting only of the conduct or statements of other defendants or co-conspirators made in his absence".

At the time counsel for the government voiced his objection to the foregoing second paragraph, the Court stated that he thought that the position of counsel for Jacobs "is correct on that. In other words, you can't, as I have got it, you cannot find that one is a co-conspirator merely and solely and exclusively on the assertions of another co-conspirator" (T.R. 1004). However, during the Court's charge, the following was stated to the jury:

> "If you conclude that the conspiracy as charged existed, you must next decide whether the defendants were members of that conspiracy. You must do so independently of the out-of-court statements and the acts and declarations of the other alleged co-conspirator.

In short, whether or not a defendant was a member of the conspiracy must be determined upon the evidence that you have heard as to his own actions, his own conduct, his own statements or declarations his own connection with the acts and conduct of the other alleged co-conspirators.

You may, in addition, consider and weigh the acts and declarations of the other co-conspirators bearing on the question of a defendant's membership in the conspiracy" (T.R. 1136).

Following the conclusion of the charge, counsel for Jacobs voiced his objection to the charge as given in the following language:

"Mr. Greenberg: When we went over the requests to charge yesterday, I thought that your Honor was going to adhere to your determination that request No. 9, which I submitted on behalf of both defendants, was to be given substantially in the language as requested.

At that time Mr. Leibhafsky made reference to his contention that the jury may consider the acts and declarations of a co-conspirator as bearing upon the other members or other alleged co-conspirators' membership in the alleged conspiracy, which of course I believe is different from the request which I requested in the following extent: that you may not base your decision as to whether or not he was a member of the conspiracy on evidence consisting only of the conduct or statements of other defendants or co-conspirators made in his absence.

I think it is a far cry to say that the membership of A in the alleged conspiracy may be based upon the conduct and declarations of B. That's the way it sounded to me.

The Court: You are wrong. The charge stands as read. I was meticulous about it, and I do not see that I said anything other than what I told you when we discussed the requests.

Mr. Greenberg: Of course, your Honor appreciates that we have to make these notes under very laborious circumstances.

> The Court: You took your exception. You have a perfect right to it. I am meeting it head-on'' (T.R. 1172-1173).

Part of the post-charge proceedings involved the request that the Court charge on the ''two man conspiracy'' (T.R. 1174). After a discussion on this point, the government agreed that the Court should charge the jury specially on the law of the two-man conspiracy because this case involved ''a sort of special situation'' (T.R. 1178). The Court then directed that counsel agree upon the language of the charge and such language was agreed upon and was marked as Court Exhibit 7. The Court then charged the jury on what had been agreed among counsel as follows:

> ''To be absolutely clear on the facts of this case, there is no conspiracy, and neither Jacobs nor Spieler can be found to be a member of a conspiracy unless and until you find beyond a reasonable doubt that both Jacobs and Spieler were members of the conspiracy. Accordingly, neither the words nor the acts of either Jacobs or Spieler are chargeable to the other unless and until both of them have gotten together with each other in the conspiracy charged'' (T.R. 1182).

The Court then asked the jury if it wished said passage to be read again, to which a juror responded in the affirmative. The Court then repeated this charge and added that it was not ''doing anything but reciting a fact when I say that I delivered that last part in measured tones'' (T.R. 1183). This additional portion of the charge was also marked as Court Exhibit 7, and became a part of the records of this case and is before this Court.

It then appears from the record that counsel for Jacobs left the Court to travel to Los Angeles, and counsel for defendant Spieler represented defendant Jacobs for the balance of the trial (T.R. 1184).

The jury started its deliberations at 12:20 p.m. (T.R. 1184). At 9:35 p.m. the jury returned to the courtroom after having submitted a note to the Court (Court Exhibit 11; T.R. 1193). The note requested the Judge's "explanation of what constituted a conspiracy and what does not constitute a conspiracy" (T.R. 1194). Thereupon, for the next hour and fifteen minutes (with the exception of about five minutes in a side-bar conference held in the robing room among court and counsel only) the trial Judge harangued the jury in a long bizarre, rambling, incomprehensible and thoroughly confusing charge of what purported to be the law on conspiracy as applicable to the facts of this case (T.R. 1194-1229). At no point in this supplemental charge did the Judge repeat to the jury the contents of Court Exhibit 7, the special charge on the law relating to the two-man conspiracy, on which counsel had agreed and which had been given to the jury immediately before the commencement of its deliberations some ten hours earlier. Nor was the attention of the Court called to the fact that it had failed to re-state to the jury the contents of Court Exhibit 7, although the paper encompassing it was in the courtroom in the possession of the Clerk at that time. Finally, at 11:40 p.m. the jurors reported their verdict of guilty as to both defendants on both counts of the indictment.

Following the jury's verdict, and before sentence, Jacobs moved, pursuant to Rule 33, Federal Rules of Criminal Procedure, to set aside the verdict and for a new trial on the ground that the supplemental charge was improper and the failure of the Court to re-state the contents of Court Exhibit 7, constituted plain error, prejudicial to the rights of the defendants. This motion was denied without any oral argument or other hearing being held on the matter.

Jacobs was sentenced to a one-year term imprisonment on both counts to run concurrently, and he was continued on bail pending appeal.

Reasons for Granting the Writ

The principal reasons for granting the writ of certiorari in this case relate to the conflict of decision and opinion among the circuits as to the proper charge to the jury in a federal conspiracy case, the constitutional issues of the right to trial by jury and against the unlawful use of electronic, transmission and recording equipment as constituting unlawful search and seizure.

1. There is a conflict among the circuits as to the proper charge to the jury on the law of conspiracy as to the standards of proof necessary to establish a defendant's membership or participation in a criminal conspiracy. The charge of the trial judge in this case as to such proof was not correct. The supplemental charge on conspiracy was not proper and correct, especially after counsel for both sides agreed that the trial judge was to and did charge particularly on the law of the "two-man conspiracy" in his original charge, which was completely omitted from the supplemental charge.

In this case the trial judge charged the jury as follows on the question of a defendant's membership in a conspiracy:

> "[W]hether or not a defendant was a member of the conspiracy must be determined upon the evidence that you have heard as to his own actions, his own conduct, his own statements and declarations, his own connection with the acts and conduct of the other alleged co-conspirators.
>
> You may, in addition, consider and weigh the acts and declarations of the other co-conspirators bearing on the question of a defendant's membership in the conspiracy.
>
> . . . In short, whether or not a defendant was a member of the conspiracy may be determined upon the reasonable inferences to be drawn from all the evidence in the case, including the evidence that you have heard as to his own actions, his own conduct,

> his own connection with the acts and conduct of the other alleged co-conspirator." (See *supra*, pp. 8 and 9.)

Of course this charge to the jury was made after the trial judge stated he would instruct the jury in accordance with Jacobs' Request Number 9, *supra*, p. 8, which he did not do. The Court of Appeals held that the above quoted charge was proper, citing its own authority. This line of authority in the Second Circuit stems from that court's opinion in *United States* v. *Nuccio*, 373 F. 2d 168 (2nd Cir. 1967), cert. den. 387 U.S. 906, and the cases following it. In substance, this line of authority authorizes a jury to be instructed that a defendant's connection with or participation in a conspiracy may be based upon hearsay and non-connecting evidence, instead of solely and only on his own acts, declarations and conduct. Other circuits have declined to follow this rule. Recently the Court of Appeals for the First Circuit specifically held that a defendant's membership in a conspiracy cannot be established by an admission of another conspirator. *United States* v. *Spock*, 416 F. 2nd 165 (1st Cir. 1969). The Seventh Circuit follows the same rule, *United States* v. *Fellabaum*, 408 F. 2d 220 (7th Cir. 1969). It would appear to be appropriate for this Court to resolve the differences among the circuits as to the proper charge in a federal conspiracy case, as to the evidence necessary to establish a defendant's membership therein. In view of the tremendous volume of federal conspiracy cases throughout the country, this Court should define the proper instructions to be given to a jury on this subject. See, *e.g.* Devitt and Blackmar, *Federal Jury Practice and Instructions* (West Publishing, 1970) §§ 29.05-29.07 and the commentary thereto; and see especially the last paragraph of § 29.05.

The charge of the trial judge in this case as to the proof necessary to determine the defendant's membership in a conspiracy was not correct, and neither was the supplemental charge, especially after counsel for both sides

agreed that the trial judge was to and did charge particularly on the law of the "two-man conspiracy" in his original charge, which was completely omitted from the supplemental charge. The proceedings incident to the charge to the jury have been set forth in detail herein, *supra*, pp. 6-10.

Two main errors stand out in the charge on conspiracy. The first relates to charging the jury that it "may, in addition, consider and weigh the acts and declarations of the other co-conspirators bearing on the question of a defendant's membership in the conspiracy" (T.R. 1136). The trial court charged this after stating that it would charge the substance of the second paragraph of Jacobs' Request Number 9, *supra*, page 8, to the effect that "you cannot find that one is a co-conspirator merely and solely and exclusively on the assertions of another co-conspirator" (T.R. 1004). Had the court so charged, after stating it would, there would be no complaint about it and no error (see T.R. 1004). However, there was nothing to this effect in the charge. Paragraph one of Request Number 9 was charged immediately preceding the portion about which complaint is made, and the requested portion which the court said it would charge, was turned about and the reverse given, that membership in the conspiracy may be based upon the "acts and declarations of the other co-conspirators" (T.R. 1136).

The government's contention was that the request contained in the second paragraph of Jacobs' Request Number 9 was erroneous, and was based upon its reading of the Second Circuit cases of *United States* v. *Nuccio*, *supra*, and *United States* v. *Ragland*, 375 F. 2d 471, (2nd Cir. 1967). In the *Nuccio* case the court held that further charges requested by defendants to the effect that in determining a defendant's membership in a conspiracy "it was 'not to consider what others may have said or done' but was to decide 'without regard to and independently of the statements and declarations of others'" were properly

refused. The court held that "all the law requires is that the jury find, on the basis of all evidence properly admitted by the Judge, a conspiracy and each defendant's purposeful entrance into it" (p. 173). This holding is not at variance with Jacobs' Request Number 9, that "you may not base your decision as to whether or not he was a member of the conspiracy on evidence consisting only of the conduct or statements of other defendants or co-conspirators made in his absence". See Devitt and Blackman *Federal Jury Practice and Instructions* (West Publishing Co., 1970), § 29.05, and annotations thereto.

The *Ragland* case merely held that the admissibility of hearsay was in the first instance a question of law for the court, after which the court shall instruct the jury to use such hearsay " 'like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent' ", citing *United States* v. *Dennis*, 183 F. 2d 201, 231 (2nd Cir. 1950, *per* L. Hand, C.J.). This ruling and holding was not at all at variance with the requested instruction of Jacobs' Request Number 9.

The importance of this request for the defendants on trial in this case is their contention and argument that there was no proof of conspiracy in this case. All of Bruh's activity in seducing Jacobs was with Jacobs alone. Spieler never entered the picture until the last meeting on May 5, 1967, when he refused to enter into any discussions with Bruh about bribing another agent. Spieler is not shown by any conduct on his part to have entered into any conspiracy with Jacobs, in spite of Jacobs long-winded conversations with Bruh. Thus if there was no joining of Spieler and Jacobs, by anything Spieler said or did, there was no conspiracy. The jury should have been told this in the form of Request Number 9. All of Jacobs' talks with Bruh about Spieler did not make

Spieler a conspirator with Jacobs, and accordingly, there was no conspiracy proved as alleged in Count One of the indictment.

The other aspect of the charge on conspiracy which was not correct was the general charge of the law of conspiracy as applied to the facts of this case. The usual charge on conspiracy speaks of what is a conspiracy, how does one join or become a member, the duration of a conspiracy, and other similar elements. In this case, the evidence adduced by the government was designed to establish that if there was a conspiracy, it was solely and only a conspiracy between Jacobs and Spieler and no one else. There is no doubt about this. Thus, at the conclusion of the charge, counsel for Jacobs stated to the trial court that he believed the charge on conspiracy was proper for the more than two-man conspiracy, but that in this case such charge was "inappropriate". He requested a charge designed to elucidate the two-man conspiracy concept. Although the court was disinclined to give such charge, the attorney for the government thought such charge to be proper and appropriate.

Thereupon, all counsel participated in the preparation of the special charge on the two-man conspiracy, and this became Court Exhibit 7. See pages 9-10, *supra*. It was read twice to the jury. It correctly stated the law, and in fact became the "law of the case" on this point. Also it was the very last thing given to the jury prior to its retiring to deliberate at 12:20 p.m.

The next time the question of the law of conspiracy came up was at 9:35 p.m. when the jury sent out a note requesting the court to charge as to what is a conspiracy and what is not a conspiracy (Court Exhibit 11). It is clear that by this point, after about nine hours of deliberations, the jury was well along in its consideration of this case and had probably reviewed all of the evidence by that time. It is also apparent that the jury was confused by the original charge on conspiracy, taken in terms of the special charge on the two-man conspiracy.

Instead of reading back to the jury the definition the court had earlier given on what constitutes a conspiracy, the requirements for proving it, and similar aspects of the law, all of which took only about half of the time prior to the recess in the middle of the charge, the trial judge launched into a very long, tortured, often bizarre, confusing, incomprehensible and rambling exposition on what purported to be the law of conspiracy. Instead of relating it to the charges in this case, in terms of the two men involved in the case, the court carried on about bank robbers, the man on the mountain-top manipulating the underlings down below, and similar confusing and wholly irrelevant and meaningless carryings-on. He spent about an hour and ten minutes on this tirade, at a very late hour, given to a jury which had been in the courthouse then for over twelve hours and obviously tired. Instead of helping the jury, the trial judge thoroughly confused the jurors and made their task impossible. The result was not only to leave the jury helpless, but also to impress upon them the sinister character of the damnable term "conspiracy". The result was obvious.

And in the supplemental charge, not one word on the two-man character of the alleged conspiracy. Court Exhibit 7, which was then before the court, was completely forgotten. The "law of the case" was completely disregarded. At the conclusion of the supplemental charge, no exception was taken by counsel then representing both defendants, to this aspect of the supplemental charge.

The totality of the circumstances of the delivery of the supplemental charge, as well as its content, required a new trial for these defendants. *United States* v. *Harris,* 388 F. 2d 373, 777 (7th Cir. 1967); *Powell* v. *United States,* 347 F. 2d 156, 159 (9th Cir. 1965). Instead of the trial judge in this case re-reading to the jury the portion of the charge he had already given, he went off on his overlong emotional tirade, completely forgetting the concrete and explicit question put by the jury. In the *Powell* case, *supra,* the court

cited *Bollenbach* v. *United States*, 326 U.S. 607, 612-613, where this Court wrote:

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."

In this case the trial judge did not do this; instead he compounded the jury's confusion by his supplemental charge. He forgot also the admonition of Mr. Justice Frankfurter, in the *Bollenbach* case, *supra*:

> "Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge" (326 U.S. 607, 612).

From the foregoing, it is nevertheless clear that the charge as given on the law of conspiracy was erroneous and prejudicial to the defendants, requiring that as to this error, the convictions should have been reversed and a new trial ordered. Review by certiorari is appropriate as to these important questions of law.

2. The rule in the Second Circuit that the trial judge makes a preliminary determination as to the sufficiency of the proof of a defendant's membership in a conspiracy, and thereupon withdraws from the jury's consideration the fact issue of such defendant's membership, deprives him of the constitutional right to trial by jury.

In its opinion affirming the judgment of conviction herein, the Court of Appeals stated as follows:

> "As we recently stated in *United States* v. *Baker*, 419 F. 2d 83, 88-89 (2 Cir. 1969):
>
> > '[I]n a conspiracy case the court must make a preliminary determination whether, if the testi-

> mony of the government witnesses is accepted as true, each defendant's own acts and statements show a connection with the conspiracy sufficient to justify the admission of the acts and statements of co-conspirators against him. (Citing cases). . . . Once the judge has made such a determination, . . . the jury may consider the acts and declarations of co-conspirators made in furtherance of the common scheme in determining whether the elements of the crime of conspiracy, including purposeful entry into the conspiracy, are present.' " (See Appendix A, *infra*, p. 13a.)

It is petitioner's contention that this statement of such rule of law is improper and erroneous and involves the invasion by a trial judge into the fact-finding functions of the jury, in violation of his absolute constitutional privilege to trial by jury.

In substance, the Court of Appeals states that in a conspiracy case the trial court first must make a preliminary determination by the acceptance as true of the testimony of government's witnesses, that then the jury may consider the acts and declarations of co-conspirators in determining the membership of other alleged co-conspirators in the conspiracy. It is this holding which petitioner submits is erroneous.

In the various cases elucidating this concept, the courts have not stated whether this determination by the trial judge is a factual determination or a judicial determination. However, it seems clear that it is a factual determination, and that thereby the trial judge is invading the exclusive province of the jury to determine questions of fact. Thus, it constitutes the trial judge imposing his fact-finding on the jury, by his instructions to them. This concept completely loses sight of the separate and distinct roles which judge and jury play in every federal criminal case, especially one involving the charge of conspiracy. In substance, by this new rule of law, the judge tells the jury that he has made a preliminary determination that the govern-

ment's witnesses testimony is to be accepted as true, sufficient to show a defendant's connection to the conspiracy and thus sufficient to justify the admission of the acts and statements of co-conspirators against him. It is the trial judge's act of accepting the testimony of the government's witnesses "as true" which constitutes his making findings of fact.

The *Baker* opinion says:

> "Once the judge has made such a determination"

that then the jury may consider the acts and declarations of the other co-conspirators in considering the particular defendant's membership in the conspiracy. It is clear that the making of any such determination by any trial judge, effectively usurps the fact-finding prerogatives and functions of the jury. The trial judge should stay out of this business where there is trial by jury. Where the trial judge does so act and does instruct the jury along the lines indicated, as the trial judge in this case did in his charge (see Appendix A, *infra*, p. 13a), amounts to a denial of substantive due process of law and trial by jury, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

In the present case, the essential issue of the jury instructions was concerned with the concept of the two-man conspiracy. Accordingly, the appropriateness of instructions relating to the sufficiency of the evidence of and the criteria for determining, the joining of a conspiracy by an alleged co-conspirator are wholly inappropriate in a situation where there is no conspiracy until the only two alleged co-conspirators enter into the criminal agreement.

At bottom, the entire problem of the trial judge making a preliminary determination of fact of a defendant's membership in a conspiracy stems from the court's decision and opinion in *United States* v. *Nuccio*, 373 F. 2d 168, 173 (2nd Cir. 1967) and the cases following it in the Second Circuit.

There the court stated that there is a preliminary question of the sufficiency of the evidence or showing of a defendant's involvement, which is for the trial court, and that upon the trial judge making such finding of involvement, he does not have to charge the jury on the preliminary question, but that he should tell them to use all the evidence as any other evidence in the case. Thus the jury may be told that a defendant's involvement in a conspiracy may be determined by the hearsay statements of co-conspirators and not solely on his own statements, acts and conduct. The First Circuit has recently declined to follow this rule. See *United States* v. *Spock,* 416 F. 2d 165 (1st Cir. 1969). The Seventh Circuit follows the First Circuit, *United States* v. *Fellabaum,* 408 F. 2d 220, 227 (7th Cir. 1969).

It is to be noted that this so-called preliminary "determination" is not the making of the judicial determination that there is sufficient evidence to warrant the submission of a case, or part of a case, to the jury. It is in fact the making of a factual determination of a defendant's connection with or participation in a conspiracy, and thereupon instructing the jury in terms of such factual determination. Again, it is submitted, such rule of law is erroneous and improper, and should be repudiated by this Court.

3. As a matter of law there was no proof of a criminal conspiracy as charged in Count One of the indictment between the two defendants named in the indictment. Apart from all other considerations of how this case was started and developed, the clear fact is that as a matter of law there was no proof of a criminal conspiracy as charged in Count One of the indictment.

In this case there is absolutely no proof that Spieler participated in, knew about, encouraged, sought, or did anything with Jacobs to attempt to bribe Bruh or any other revenue agent. All of the talk between Bruh and Jacobs, which clearly was stimulated and encouraged by Bruh, had as its objective bringing Spieler into the picture. But this

never happened. The ultimate meeting on May 5, 1967, between Bruh and Spieler at Jacobs' office was accidental and wholly fortuitous. Bruh attempted to get into a private discussion with Spieler, looking towards bribe talk, but Spieler did not take the bait. On the crucial points of the conversation, the tape is strangely silent. The claim by Bruh as to Spieler's agreement, by a nod of the head, is not on the tape. The mention of money is allegedly by holding up fingers. Instead of getting into this trap, Spieler ran. He later denied these essential elements of the conversation in his trial testimony.

Actually, Spieler, Jacobs and Bruh were only together for a moment. Nothing significant took place, except that Bruh asked to talk to Spieler alone. Jacobs then left them alone for a while. None of this was conspiratorial conduct.

Jacobs acted like a fool in allowing Bruh to carry him on this attempted entrapment, but the essential element of the crime of conspiracy was never established, the element of agreement between Spieler and Jacobs to attempt to bribe Bruh or any other revenue agent. There was no proof of this element, either by direct or circumstantial evidence. This whole case amounts to nothing but talk, all stimulated and encouraged by the government agents. No act in furtherance of the attempted government scheme was ever committed by either defendant. The plain fact is that nothing ever was done by *either* defendant *with the other* in furtherance of the conspiracy alleged in Count One of the indictment. Accordingly the proof of conspiracy fails as a matter of law.

4. As a matter of law there was no proof of the substantive crime of bribery by petitioner Jacobs, as charged in Count Two of the indictment. The second or substantive count of the indictment charged both defendants with the crime of bribery, in violation of Title 18, United States Code, § 201. In pertinent part, the bribery statute provides that it is a crime to give, offer or promise "anything of value to any public official . . . with intent (1) to

influence any official act; or (2) to influence such public official . . . to commit or aid in committing or collude in, or allow, any fraud or make opportunity for the commission of any fraud, on the United States . . .". When viewed in terms of this statute, it is clear that as a matter of law Jacobs did not commit or attempt to commit the crime of bribery.

The government's theory in this case was that Jacobs was the principal and Spieler aided and abetted him in the commission of this offense. See T.R. 995-998; Government Request Number 11. Yet, and in spite of this theory, there was no proof or any testimony by Bruh that Jacobs ever offered him any money or other thing of value. In spite of the many leading, slanted and entrapping conversations with which Bruh enveigled Jacobs, at no time did Jacobs make any offer, express or implied that he would pay anything to Bruh or anyone else, or get anyone else including Spieler to do so. Actually, all Bruh wanted from Jacobs was to meet Spieler so that he could carry on direct talks with Spieler. Their ultimate meeting was not arranged, but was wholly accidental.

As a matter of fact, the transcripts of the recordings of meetings between Bruh and Jacobs (Government Exhibit 13 counterparts) disclose no talk of any offers by Jacobs to Bruh. As to Spieler, he too walked away from Bruh's discussion or request for money (if there was one, which is doubtful from the record).

When the government was caught in the posture of no offers being made by Jacobs or Spieler to Bruh, it tried to extricate itself from this predicament by having Jacobs appear to be the principal and Spieler the aider and abettor. But there was no evidence to support this theory. That is why the court's charge of Government Request Number 11 was so damaging and erroneous to appellants, especially after the court stated it would not tell the jury which was the principal and which the aider and abettor. It gave

the jury the government's theory (after the court said it would not) without any evidence to support it. The proof on this substantive count completely failed.

5. The use of electronic, radio transmission and recording equipment by the government without a warrant to overhear, record and transmit conversations in petitioner Jacobs' office, violated his constitutional rights against unlawful search and seizure.

The question of law on this point is presently before this Court in the case of *United States* v. *White,* No. 13, Oct. Term 1970, which was re-argued on October 20, 1970. This case is before the Court on a grant of certiorari to the government following the holding by the Seventh Circuit contrary to the government's contention that overheard conversations in which electronic eavesdropping was accomplished should not be suppressed. Also, in this case there was no search or other warrant issued by a judicial officer authorizing the eavesdropping, recordings or transmissions. In this case there were timely motions to suppress the transcripts and testimony of Agent Redmond on the conversations, all of which were received in evidence over defense objections.

In view of the pendency of the *White* case, which may be dispositive of this point, no extended argument on this point will be made herein.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

DANIEL H. GREENBERG
Counsel for Petitioner

October 23, 1970

APPENDIX "A"

(Opinion of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 495, 496—September Term, 1969.

(Argued January 12, 1970 Decided August 24, 1970.)

Docket Nos. 33885, 34369

UNITED STATES OF AMERICA,

Appellee,

v.

MORTON JACOBS and IRVING SPIELER,

Defendants-Appellants.

Before:

MEDINA, WATERMAN and SMITH,

Circuit Judges.

Appellants seek reversal of judgments of conviction entered upon jury verdicts of guilty following a trial in the United States District Court for the Southern District of New York, Cooper, *J.*, in which they were both charged with having violated and with having conspired to violate 18 U.S.C. §§ 201 and 1503. The judgments of conviction are affirmed.

EDWARD M. SHAW, PAUL B. GALVANI, Asst. U. S. Attorneys, ROBERT M. MORGENTHAU, U. S. Attorney, for Appellee.

DANIEL H. GREENBERG, New York City, for Appellant Jacobs.

IRVING L. WEINBERGER, Moses Polakoff, New York City, for Appellant Spieler.

WATERMAN, *Circuit Judge*:

Codefendants, Jacobs and Spieler, were charged, first, with conspiring to bribe an Internal Revenue Service agent to influence an IRS investigation and so to obstruct justice in violation of 18 U.S.C. §§ 201, 1503 (18 U.S.C. §§ 371, 2), and, second, with offering a bribe to the agent, 18 U.S.C. § 201.[1]

They were tried to a jury which returned verdicts of guilty against both defendants on both counts. Jacobs re-

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[1] In addition, the indictment charged Spieler with four counts of perjury before a grand jury in violation of 18 U.S.C. § 621, but these counts were severed before trial.

Section 201 provides in relevant part:

* * *

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anyhing of value to any public official . . . with intent—

(1) to influence any official act; or

(2) to influence such public official . . . to commit or aid in committing, or collude in, or allow, any fraud, or make oportunity for the commission of any fraud, on the United States; or

(3) to induce such public official . . . to do or omit to do any act in violation of his lawful duty . . . [commits a crime].

Section 1503 provides in relevant part:

Whoever . . . corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice . . . [commits a crime].

ceived concurrent sentences of one year on each count. Spieler was given suspended concurrent one-year prison terms and placed on probation for one year. Jacobs was released on his own recognizance pending the outcome of this appeal.

On appeal from the judgments of conviction they both advance the following claims: (1) the evidence was insufficient to convict them for attempted bribery or for conspiracy to bribe; (2) certain portions of the court's charge to the jury constituted reversible error; and (3) the use, without first having obtained a warrant authorizing the use, of electronic transmitting and recording equipment to overhear and record conversations violated their rights under the Fourth Amendment. In addition, appellant Spieler contends that he was a victim of a government plan of entrapment, and, also, that the court improperly denied his motion for a new trial predicated on "newly discovered evidence". We affirm both convictions.

The fateful progression of events and circumstances that ultimately led to appellants' indictments began in 1966 when the Regional Inspector's Office of the Internal Revenue Service in New York City undertook an investigation into an alleged attempt by a Martin Siegel and a Harold Adler to bribe a Revenue Agent, Gerald Stone, in connection with an audit of the 1964 and 1965 federal income tax returns of television comedian Alan King. Siegel, who served as King's accountant, and Adler, who was a theatrical agent for King, were subsequently indicted by a grand jury in mid-1967. Appellant Spieler, an attorney, represented Siegel in that grand jury proceeding. Appellant Jacobs, a businessman working in Manhattan, was a friend of and sometimes a lender of money to Spieler. Brian Bruh, a Special Agent of the IRS Intelligence Division, who was the Government's principal witness at the Jacobs and Spieler trial, completes the cast of characters. Agent Bruh was friendly with Jacobs. They had lived near each other

in Brooklyn and Bruh had occasionally commuted in Jacobs's car to and from work with Jacobs.

On April 4, 1967, Jacobs telephoned Agent Bruh and asked Bruh to meet him at his office the following morning. Bruh complied, and thus began a series of meetings between the two.

The jury found that the Government had proved beyond a reasonable doubt that the objective which Jacobs and Spieler sought to attain by contacting Bruh was to arrange a way to get Martin Siegel out of trouble with the law by enlisting the efforts of Bruh to that end and by the strategic placement of bribe monies to be raised through the efforts of Jacobs and Spieler. The story is best unfolded by relating the substance of what occurred during each of the meetings.

The Meetings of April 5 between Jacobs and Agent Bruh

Jacobs explained his purpose for wanting to meet with Bruh by saying that Jacobs's attorney and long-time friend had given him a description of an agent handling a case of bribery against Martin Siegel. Jacobs was positive the described agent was Brian Bruh, and further related (according to Bruh's recollection at trial) that:

> . . . his attorney had asked him if he [Jacobs] knew anyone over at 120 Church Street well enough to talk to, there would be a lot of money in it for that person if he could present a case on Siegel favorably, thereby it would go easier on Siegel.

Bruh asked Jacobs if he realized the seriousness of what he was proposing, but Jacobs replied that he did not regard anything about their discussion as illegal, that he considered Bruh his friend, and that he would report to his attorney that Bruh "just wasn't interested." Bruh left.

The matter did not end there, however, for Bruh, after having talked the situation over with his supervisor and after having reported the conversation to the Internal Revenue Inspection Service, returned to Jacobs's office that afternoon. Upon seeing Bruh, Jacobs expressed the hope that Bruh was not upset by the morning's discussion and said, as if coaxing were needed, that he knew that Bruh was interested in buying a house and "here was a chance . . . to make a lot of money." After Jacobs asked him if he were "really interested," Bruh replied that he would be, but first wanted to know what he was expected to do and how much was being offered for his help. Jacobs then dialed a telephone number and left word for a "Mr. Spieler" to return his call. Before Bruh left Jacobs told him the name of the attorney involved was Irving Spieler and that he would be in touch with Bruh again after he had talked with Spieler.

The Meeting of April 11 between Jacobs and Bruh

Prior to proceeding to Jacobs's office for another meeting Agent Bruh was equipped with a transmitting and recording device concealed on his person for the purpose of recording what might be said.[2] After some preliminary conversation. Jacobs said, "Spieler would like to know if Siegel was going to be indicted, and, if he was, he would like the indictment quashed." Jacobs then explained that Bruh could "perpetrate a fraud" on Siegel and Spieler by "getting $5,000 as a fee in advance and then, if the Government voluntarily decides not to indict Siegel, [Bruh] could always say that [he] killed the indictment and keep the

[2] The transcript of the recording of the April 11 conversation between Jacobs and Agent Bruh was supplied to the defense but was not offered into evidence by either the Government or the defendants. The substance of the meeting, however, was provided at trial by the testimony of Bruh.

money." Bruh replied by asking if $5,000 was what was being offered. Jacobs said that he had not as yet discussed the amount of the offer with Spieler, but that Bruh "could name [his] own price." Jacobs also told Bruh that Jacobs would be the one to transfer the money because Spieler "trusted him completely." Bruh was then assured that he would receive his money in advance and that Spieler would be the one to put up the money. Jacobs suggested that Bruh familiarize himself with Siegel's file and "determine how an indictment could be stopped." As a parting word Jacobs cautioned, "Be careful and don't get into trouble."

The Meeting of April 18 between Jacobs and Bruh

Agent Bruh was again outfitted with electronic eavesdropping devices and went to Jacobs's office.[3] Jacobs informed Bruh that he had talked with Spieler and that Spieler wanted Bruh's opinion. Bruh said that there was "a definite case" against Siegel, that he knew the IRS inspector handling the investigation, and because "it involves another fellow," $5,000 would not be enough. Bruh wanted to know what amount Spieler would be willing to offer and whether he should go ahead and contact the investigator handling the case. Jacobs then tried several times to reach Spieler on the phone to get answers to Bruh's questions, but Spieler's line was busy. Before Bruh left Jacobs told him not to do anything until he received further instructions.

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[3] The transcript of the recording of this meeting, and the transcripts of recordings made at subsequent meetings of April 20, 26, and May 5 (see *infra*) were offered and received in evidence over defense objections and after the denial of defense motions to suppress. In addition, Bruh testified as to his recollection of the conversations at these meetings.

The Meeting of April 20 between Jacobs and Bruh

Armed with electronic transmitting devices, Bruh met with Jacobs at his office again. This time Jacobs explained that he had discussed with Spieler the amount required for Bruh's cooperation and that Spieler had told him to start negotiations with $5,000.[4] Bruh replied that $5,000 "doesn't evn sound like it's in the ballpark." Jacobs also explained that Spieler was extremely reluctant to meet Bruh or to become directly involved with the agent. Bruh indicated he was unhappy with Spieler's supposed unwillingness to "get involved" and that he felt Spieler was "holding back information." Jacobs agreed to report Bruh's comments to Spieler.

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[4] The transcript of the transmitted and recorded conversation at the meeting on April 20 reveals the following:

Bruh: How much money?

* * *

Jacobs: He [Spieler] said start with 5.
Bruh: Thousand?
Jacobs: Yeah, start with 5, then you can make a countup, they can say they want 10, they want 50 or 100 but you gotta start someplace. . . .

* * *

Bruh: . . . According to Spieler, now Spieler says that the only thing in question now is the price. I mean he wants me to go ahead and try to kill any case against Siegel.
Jacobs: Yeah. Put it this way; they want it taken care of whether the price is satisfactory, I couldn't tell you. Now the only way to begin to know is that you've got to find and he hasn't had a chance and he won't be able to until Monday but he feels right now that that will do it. 5 grand, he feels that will be all right. And I think myself, and I'm just here purely as an inbetween Agent I don't, I'll ask that's all. He says make the offer and the most that can happen is they're gonna come back with a counter--offer and that was it.

The Meeting of April 26 between Jacobs and Bruh

At this meeting, held at Jacobs's office, and again monitored and recorded on surveillance equipment, Jacobs reported to Bruh that Spieler had said, when told that $5,000 would not be enough: "Well, ask the man how much he wants for the mortgage, that's all, and we'll see whether we can raise that kind of money." Bruh then told Jacobs he wanted to meet with Spieler. Jacobs agreed to arrange it and said he would tell Spieler "It's coming to a head now. Something has got to be done now."

The Final Meeting of May 5 between Spieler, Jacobs and Bruh

At this meeting, "bugged" as before, Bruh was introduced to Spieler at Jacobs's office. Jacobs began the relevant conversation by saying, "This guy can not raise any mortgage of that kind." Spieler then said, "That's the point. I don't think he can raise anything." After further discussion about Siegel's financial difficulties and the possibility that Siegel could turn to those with whom he had been associated (King or Adler) for the necessary funds, Bruh told Jacobs he wanted to talk with Spieler in private. Jacobs complied by going to another part of his office. Bruh then declared, "Morty [Jacobs] told me that you told him that Siegel was willing to pay $5,000." According to Bruh's testimony, Spieler nodded his head affirmatively and said in a low voice, "Yes. Then he [Siegel] said he had to borrow it."[5] Bruh again made it clear that the figure would

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[5] The recording of this portion of the conversation did not pick up Spieler's "Yes," but did record, "Then he said he had to borrow it."

Spieler further explained Siegel's reluctance or inability to raise "mortgage" money as follows:

> Spieler: I said [to Siegel] I think I can save you. If I can't, I can't. But when I start talking about mortgage money, he almost collapsed right here on 60 Broadway. He started telling me he hasn't got this, he hasn't got that. . . .

have to be "much higher than $5,000" and Spieler promised to talk with Siegel and get back to Bruh. After more incidental conversation Spieler left. Before Bruh departed, Jacobs and Bruh agreed that nothing would be done on the case until money was forthcoming.

No meetings followed, and Bruh was unsuccessful in subsequent attempts to reach Spieler by phone. On May 24, when Bruh called for the last time, he was advised by a female voice, "Mr. Spieler says he is not interested."

At the trial Spieler testified in his own behalf. Jacobs did not take the stand. Spieler denied instructing Jacobs to solicit Bruh's assistance in the Siegel matter and explained that his conversations on May 5 with Bruh, whom he said he met by accident while visiting Jacobs to borrow money, were solely calculated to discourage Bruh from continuing his attempts to be paid a bribe.

We now turn to a discussion of the claims of prejudicial error.

I.

Appellants' challenge to the sufficiency of the evidence to convict them of attempted bribery rests on their contention that they never got beyond the stage of preparation to commit the offense and never made the alleged attempt. We do not agree.

To begin with, as was said in *United States* v. *Manton*, 107 F.2d 834, 839 (2 Cir. 1938), *cert. denied*, 309 U.S. 664 (1940), "We must take that view of the evidence most favorable to the government and sustain the verdict of the jury if there be substantial evidence to support it. Hodge v. United States, 6 Cir., 13 F.2d 596; Fitzgerald v. United States, 6 Cir., 29 F.2d 881." See, e.g., *United States* v. *Dardi*, 330 F.2d 316, 325 (2 Cir.), *cert. denied*, 379 U.S. 845 (1964); *United States* v. *Tutino*, 269 F.2d 488, 490 (2 Cir. 1959).

The evil sought to be prevented by the deterrent effect of 18 U.S.C. § 201(b) is the aftermath suffered by the public when an official is corrupted and thereby perfidiously fails to perform his public service and duty. Thus the purpose of the statute is to discourage one from seeking an advantage by attempting to influence a public official to depart from conduct deemed essential to the public interest. As Judge Hastie aptly stated in *United States* v. *Labovitz,* 251 F.2d 393, 394 (3 Cir. 1958):

> It is a major concern of organized society that the community have the benefit of objective evaluation and unbiased judgment on the part of those who participate in the making of official decisions. Therefore, society deals sternly with bribery which would substitute the will of an interested person for the judgment of a public official as the controlling factor in official decision.

It therefore follows that Section 201(b) is violated even though the official offered a bribe is not corrupted, or the object of the bribe could not be attained, or it could make no difference if after the act were done it turned out that there had been actually no occasion to seek to influence any official conduct. See, e.g., *Kemler* v. *United States,* 133 F.2d 235, 238 (1 Cir. 1943).

It is also perfectly plain that the crime is consummated irrespective of whether an offer of an amount of money to influence an official's behavior is accepted by the official. Here the fact that Agent Bruh at the April 20 meeting between Jacobs and Bruh held out for more than $5,000 offered him has no bearing upon whether the offerors violated 18 U.S.C. § 201(b). It is also immaterial that Jacobs and Spieler were thwarted in their efforts to raise any money at all to pass on to Bruh. The crime was completed when Jacobs expressed an ability and a desire to pay Bruh $5,000 at their April 20 meeting. Jacobs was speak-

ing for himself but he also was acting as Spieler's spokesman. This became abundantly clear by Spieler's admissions at the meeting of May 5 (see note 5 and accompanying text *supra*). The jury could well have found that Jacobs's statement of April 20 that Spieler had told him to "start with 5," (see note 4 *supra*) was a clearly expressed "opener" to Bruh that Jacobs *and* Spieler were ready, willing and able to close the deal at that amount, and was a statement designed to influence Bruh to accept $5,000 as a bribe for disposing of the case against Siegel.

Appellants also claim that inasmuch as Bruh was told not to go ahead with any efforts to help Siegel out of difficulty until the amount of the bribe was determined and he had received the money, Bruh's official behavior was not influenced, nor could it have been influenced until these preliminary negotiations were settled, an agreement reached, and the money paid. This precautionary advice to Bruh, however, does not negate the guilt of the defendants. The statute makes *attempted* bribery a crime, and so long as a bribe is "offered or promised" with the requisite intent "to influence *any* official act" the crime is committed. "Criminality does not get rid of its evil quality by the precautions it takes against consequences, personal or pecuniary. . . . Guilt is incurred by the trial—success may aggravate, it is not a condition of it." *United States* v. *Russell*, 255 U.S. 138, 143 (1921).

As for the claim that, considered separately from the evidence adduced applicable to the substantive count, there is insufficient evidence to sustain the convictions on the conspiracy count, it suffices to say that Bruh's testimony and the evidence contained in the transcripts of the recordings of the last four meetings, if accepted as true, overwhelmingly establish that the defendants had entered into

a criminal agreement to bribe a government official and to obstruct justice.[6]

II.

Appellants contend that the court's charge to the jury and a supplemental charge were erroneous in a number of respects. We find no merit in any of these contentions and discuss but two of them, and those two but briefly.

First, appellants claim that it was error for the court to refuse to include within its charge an instruction at Jacob's request to the effect that the jury could not find that a defendant was a co-conspirator solely on the assertions of another co-conspirator.[7] The court's omission of

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[6] An example of Jacob's and Spieler's complicity in an agreement to bribe Bruh when viewed against the evidence as a whole is found in their conversation of May 5.

> Jacobs: Right now something can be done baby. It can be mailed for him [Siegel].
>
> Spieler: What I'll do is every now and then he calls me, see what I'll do, I'll call him back and say I got a message. I didn't get a message. I'll say I understand you called me. I know he asked me to come down here and I'll feel him out. He's really stupid, between you, me, and the lamppost. I break my back to get extra insurance.
>
> Jacobs: Right now sure.
>
> Bruh: He's got a lot to lose.
>
> Jacobs: To prevent something right now is the time.

The record is replete with such examples.

[7] The request is as follows:

> In deliberating on this question of each defendant's knowing participation or membership in the conspiracy, you must consider the evidence as to each defendant individually. You must confine your deliberations to the independent evidence as to his own actions, his own conduct, his own statements or declarations, and the reasonable inferences to be drawn from such independent evidence. You may not base your decision as to whether or not he was a member of the conspiracy on evidence consisting only of the conduct or statements of other defendants or co-conspirators made in his absence.

the requested instruction was not error, however, for its instruction relating to the jury's duty with reference to ascertaining each defendant's membership in a conspiracy was all that was legally required under the facts of the case. The judge instrtucted:

> [W]hether or not a defendant was a member of the conspiracy must be determined upon the evidence that you have heard as to his own actions, his own conduct, his own statements and declarations, his own connection with the acts and conduct of the other alleged co-conspirators.
>
> You may, in addition, consider and weigh the acts and declarations of the other co-conspirators bearing on the question of a defendant's membership in the conspiracy.
>
> . . . In short, whether or not a defendant was a member of the conspiracy may be determined upon the reasonable inferences to be drawn from all the evidence in the case, including the evidence that you have heard as to his own actions, his own conduct, his own connection with the acts and conduct of the other alleged co-conspirator.

As we recently stated in *United States* v. *Baker*, 419 F.2d 83, 88-89 (2 Cir. 1969):

> [I]n a conspiracy case the court must make a preliminary determination whether, if the testimony of the government witnesses is accepted as true, each defendant's own acts and statements show a connection with the conspiracy sufficient to justify the admission of the acts and statements of co-conspirators against him. (Citing cases). . . . Once the judge has made such a determination, . . . the jury may consider the acts and declarations of co-conspirators made in furtherance of the common scheme in determining whether the elements of the crime of conspiracy, including purposeful entry into the conspiracy, are present.

See also *United States* v. *Lopez*, 420 F.2d 313, 317-318 (2 Cir. 1969); *United States* v. *Geaney*, 417 F.2d 1116 (2 Cir. 1969). We hold that on the basis of the evidence that had been presented in the case the judge's charge sufficiently apprised the jury of its fact-finding function.[8]

Second, the appellants contend that a supplementary unobjected-to-instruction given to the jury after their deliberations had started was so erroneously prejudicial to their case as to be "plain error" (Fed. R. Crim. P. 52). The instruction was given in response to a note from the jury requesting the judge to explain "what constitutes a conspiracy and what does not constitute a conspiracy". Despite Fed. R. Crim. P. 30, appellants attack the supplemental charge. They attack it as "long, bizarre, rambling, incomprehensible and thoroughly confusing", as "tortured", and as being an "emotional tirade". The court is accused of "haranguing" the jury with "wholly irrelevant and meaningless carryings-on", which resulted in leaving the jury "helpless", "thoroughly confused", and im-

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[8] Upon the completion of the court's main charge, counsel on both sides agreed that the jury could well be further instructed as to the law relative to the proof of membership in a two-man conspiracy, the conspiracy the Government had the burden of establishing here. The language of the added instruction was agreed upon by all counsel, and the court then read to the jury the following agreed-upon instruction, which was repeated a second time at the request of a juror.

> To be absolutely clear on the facts of this case, there is no conspiracy, and neither Jacobs nor Spieler can be found to be a member of a conspiracy unless and until you find beyond a reasonable doubt that both Jacobs and Spieler were members of the conspiracy. Accordingly, neither the words nor the acts of either Jacobs or Spieler are chargeable to the other unless and until both of them have gotten together with each other in the conspiracy charged.

pressed with the "sinister character of the damnable term 'conspiracy'."[9]

We have accorded the judge's supplemental charge a most careful review and though perhaps it was a bit "long," we find it to be in all respects fair and proper.

III.

Appellant Spieler claims that Agent Bruh's persistent efforts to be offered an amount in excess of $5,000, his insistence on meeting with Spieler face-to-face, and his repeated suggestions that Siegel be persuaded to turn to others to raise the bribe monies prove that Spieler was entrapped as a matter of law. Although not raised as a defense at trial, the court, presumably because of what Spieler had said during his testimony, instructed the jury with reference to the law of entrapment.[10] The judge's instruction was not objected to at trial nor is it challenged here. Rather, appellant Spieler contends that we should

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[9] Brief for defendant Jacobs, at 14, 21-22, 23. The brief for defendant Spieler does not contain the quoted language, but states, at 30: "Argument in respect of errors in the Charge is contained in the Brief on behalf of the codefendant Jacobs and will not be repeated herein. Spieler adopts said argument and relies thereon."

The only specific allegation of prejudice advanced by appellants concerning the supplemental charge is that the court should have related its instructions to a "two-man conspiracy" rather than to conspiracies involving more than two members. However, the judge had already instructed the jury as to "two-man conspiracies" (see the instruction set out at note 8 *supra*) prior to the jury's retiring to deliberate, and the defendants did not request him to repeat that charge. Contrary to appellants' position, the court's suplemental charge was responsive to the jury's question and did not depart from "the law of the case."

[10] Spieler testified that on May 5 Bruh "tried to create the impression to me that if he had money he could save Mr. Siegel from any further trouble."

reverse his conviction because of his entrapment in spite of his lack of reliance upon that defense at trial. Apart from the fact that this ground is raised for the first time on appeal, see, e.g., *United States* v. *Bishop,* 367 F.2d 806, 809 (2 Cir. 1966), it seems certain that the jury could surely have properly found that the defendants "initiated" the crime and had the "propensity" to commit it. E.g., *United States* v. *Weiser,* — F.2d — (2 Cir. 1969). Accordingly we hold that Bruh did not entrap Spieler to commit the crimes for which he was indicted and, moreover, we add that Bruh's conduct does not "shock the conscience of the court." See, e.g., *United States* v. *Smalls,* 363 F.2d 417, 420 (2 Cir. 1966), *cert. denied,* 385 U.S. 1027 (1967).

IV.

After conviction and before sentencing appellant Spieler moved the trial court to set aside the verdict and order a new trial. The trial court denied the motion without granting Spieler a hearing on the merits of his claims. The ground for the motion, "newly discovered evidence," was alleged to be Jacob's first-time revelation to Spieler, after the verdicts were rendered, that portions of the May 5 tape contained portions of a telephone conversation between Jacobs and Bruh in Jacobs's office on April 26. Spieler alleged that the Government had doctored the tape of the May 5 meeting by inserting onto that tape certain recordings of Spieler's telephone voice recorded on April 26, and that conversations he purportedly held with Bruh on May 5 were actually conversations between him and Jacobs on April 26. Other portions of the May 5 tape, according to Spieler's affidavit, were not recordings of his voice at all, his claim being that his voice had been somehow simulated and a recording of the simulated voice sworn to as being his voice. The denial of the motion was proper.

First, Spieler's "newly discovered evidence" was not "newly discovered" at all. Spieler brought up this very issue at trial but, as stated in his affidavit in support of the motion, he explicitly declined at trial to pursue his contention that the May 5 tape did not reflect what he had actually said on May 5 and was an altered tape.[11]

Spieler attributes his abandonment of the claim at trial to the poor advice of his trial counsel and the fact that he himself was not "thinking clearly and was in a state of shock, overwhelmed by financial problems and the humiliation that faced him if convicted." We can understand an accused's frame of mind during the course of his prosecution, but the trial judge was in a better position than we to assess Spieler's capacity to understand the nature of the forensic proceedings as the trial progressed. Moreover, while testifying, Spieler took a position diametrically opposed to that taken in his motion. Spieler stated that whatever conversations he had had with Jacobs between April 18 and May 4 related only to money he owed Jacobs. Furthermore, while testifying at trial he admitted speaking the very words he claimed in his post-trial motion to have been improperly simulated or transposed. It is little wonder that the court below declined to reopen the issue and regarded the matter as closed.

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[11] Also prior to the trial in a letter dated September 9, 1967 to the Foreman of the Grand Jury before which he had testified, Spieler stated:

> In certain portions of the recording [of the May 5 meeting] where the voice is supposed to be mine, it is not my voice. Certain portions of the recording did not take place on May 5, 1967, the only time I ever personally saw or talked to Special Agent Bruh, which was at the office of my client, Mr. Morton Jacobs. . . . In other words, the tape recording includes part of a conversation between Mr. Jacobs and myself which took place at an entirely different time and has been inserted in such a way as to appear as part of the May 5, 1967 conversation.

V.

Appellants' final point raises the legality of the use in this case of electronic eavesdropping devices. We decline to depart from our former decision on this point, which squarely holds contrary to appellants' contention that their fourth amendment rights were violated. *United States* v. *Kaufer,* 406 F.2d 550 (2 Cir.), *aff'd,* 394 U.S. 458 (1969). See also *United States* v. *Kelly,* 420 F.2d 26, 29 n.1 (2 Cir. 1969); contra, *United States* v. *White,* 405 F.2d 838 (7 Cir.), *cert. granted,* 394 U.S. 957 (1969).

The judgments of conviction are affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 917

MORTON JACOBS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 6199

IRVING SPIELER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Southern District of New York, petitioners Jacobs and Spieler were convicted of offering a bribe to an Internal Revenue Service agent in violation of 18 U.S.C. 201 and of conspiracy in connection therewith in violation of 18 U.S.C. 371–372. Each was sentenced to concurrent one-year prison

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terms; Spieler's sentence was suspended and he was placed on probation for one year. The court of appeals affirmed, 431 F. 2d 754 (J. Pet. App. A; S. Pet. App. A).[1]

In 1966 the Internal Revenue Service investigated an alleged attempt by one Martin Siegel and one Harold Adler to bribe a revenue agent involved in a federal income tax audit of tax returns of television comedian Alan King. Siegel and Adler were subsequently indicted. Petitioner Spieler, an attorney, represented Siegel in the grand jury proceeding leading to the indictment; petitioner Adler was a friend of Spieler. Brian Bruh, an Internal Revenue Special Agent and the government's principal witness in petitioners' trial, was friendly with Jacobs and occasionally commuted to and from work with him. (S. Pet. App. 3a.)

In April 1967, before Siegel was indicted, Jacobs requested that Bruh meet him at his office. Jacobs mistakenly believed that Bruh was directly involved in the investigation of Siegel being conducted by the Internal Revenue Service. Bruh met with Jacobs on April 5, at which time Jacobs discussed the Siegel investigation and indicated that an attorney acquaintenance had mentioned "there would be a lot of money in it" for any revenue agent who could "present a case on Siegel favorably, thereby it would go easier on Siegel." (S. Pet. App. 4a.)

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[1] The petition in No. 917 is referred to as "J. Pet."; the petition in No. 6199 is referred to as "S. Pet.". We note that the petition in No. 917 is out of time under Rule 22(2).

Bruh reported Jacob's remarks to his superiors and with their approval returned to Jacob's office on the afternoon of April 5. Additional meetings between Jacobs and Bruh occurred on April 11th, 18th, 20th and 26th. Jacobs identified petitioner Spieler as the attorney involved, and on May 5 Bruh met with Jacobs and Spieler at Jacobs' office. At the April 11th and all subsequent meetings, Bruh carried concealed transmitting and recording equipment. Transcripts of the recordings thus obtained, except for the April 11th meeting, were received into evidence over objection. They and the testimony of Bruh formed the basis of the government's case against petitioners. (S. Pet. App. 4a–9a.)

The government's proof indicated that the objective which Jacobs and Spieler sought to attain by contacting Bruh was to assist Siegel with his legal difficulties by enlisting Bruh and using bribe monies to be raised by Jacobs and Spieler. Petitioners denied that any bribe attempt occurred or that any conspiracy existed.

In the court of appeals petitioners sought reversal of their convictions on essentially the same grounds advanced here, that: (1) the evidence against them is insufficient; (2) portions of the judge's charge to the jury constitute reversible error; and (3) the use of the recorded conversations as evidence against them, where the electronic overhearing was not authorized by a warrant, violates their rights under the Fourth Amendment. Spieler additionally contended (as he does here) that he was the victim of a government plan of en-

trapment, and that his motion for new trial predicated on alleged newly discovered evidence was improperly denied. In its careful opinion, the Second Circuit considered and rejected each ground asserted by petitioners, and accordingly affirmed their convictions. We here rely on the comprehensive opinion of the court below, adding only two matters.

1. Petitioners attack the trial judge's instructions to the jury (S. Pet. App. 13a) concerning proof of their participation in a conspiracy as improper and inconsistent with the principles followed in other circuits.

In the Second and Ninth Circuits, the trial judge may instruct the jury that the participation of any defendant in a conspiracy can be established by evidence of the acts and statements of other alleged conspirators. See, *e.g.*, *United States* v. *Baker*, 419 F. 2d 83 (C.A. 2), certiorari denied, 397 U.S. 976; *United States* v. *Nuccio*, 373 F. 2d 168 (C.A. 2), certiorari denied, 387 U.S. 906; *Carbo* v. *United States*, 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953. First, however, the judge "must make a preliminary determination whether, if the testimony of the government witnesses is accepted as true, each defendant's own acts and statements show a connection with the conspiracy sufficient to justify the admission of the acts and statements of co-conspirators against him." *United States* v. *Baker*, *supra*, 419 F. 2d at 88. If the judge so finds, the jury is instructed to consider all the evidence admitted, including evidence of the acts and statements of co-conspirators, to determine whether the

defendant purposefully became a part of the conspiracy. The older practice, for which petitioners apparently contend, was to charge that, while all the evidence could be considered in determining whether a conspiracy existed, the jury must determine from independent proof of the defendant's own acts that he was a member of the conspiracy, and then could consider acts and declarations of co-conspirators in determining guilt beyond a reasonable doubt.

The present rule in the Second and Ninth Circuit results in a presentation of the issues to the jury in a simpler and more comprehensible fashion than was required under the older procedure while, at the same time, it safeguards the rights of the defendant in that the judge must determine, as a matter of law, whether the evidence of his membership in the conspiracy is sufficient to warrant submission of that issue to the jury. As noted in *Carbo* v. *United States, supra,* 314 F. 2d at 737, this approach is consistent with the usual allocation of functions between judge and jury which assigns to the judge the task of deciding preliminary questions of fact determinative of the admissibility of evidence. In this context the instructions in this case properly apprised the jury of its fact-finding function and protected rather than impaired petitioners' Sixth Amendment jury trial rights.

2. The issue whether a warrant is necessary to support the introduction of an electronic recording made with the consent of one party to the conversation—previously decided in *Lopez* v. *United States,* 373 U.S. 427—is before this Court in *United States* v. *White,*

No. 13, this Term. While this case differs from *White* in that the government agent here testified at petitioners' trial, the Court may wish to defer consideration of this petition pending its decision in *White*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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